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No. 09-1142

IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A.,

Petitioner,

v.

JOHN C. GORMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States.[1] ABA has

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[1] This brief is filed with the written consent of Petitioner and Respondent. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and CBA and their members, made a monetary contribution to the preparation or submission of the brief.

members in each of the fifty states and the District of Columbia. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States.

The California Bankers Association ("CBA") is a non-profit trade association established in 1981 that represents most of the FDIC-insured depository financial institutions in the State of California. CBA's members range in size from small community banks to the largest banks in the country.

Many of the members of ABA and CBA (collectively the "Associations") issue credit cards and most of them provide some form of consumer credit. In addition, most, if not all, of the Associations' members report some form of consumer information to credit reporting agencies ("CRAs"), as part of the national credit reporting system established by the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (the "FCRA"). The Associations are filing this brief to emphasize that a single national standard for enforcing credit reporting obligations is essential to the health of the banking and consumer lending system.

The Associations frequently appear in litigation as a party or amicus where the issues raised in a case are of widespread importance and concern to the industry. The Associations are authorized to pursue their members' interests in representing them before this Court to urge review of this case of great importance to the financial services industry.

SUMMARY OF THE ARGUMENT

This case warrants review. The ruling of the court below – requiring that voluntary furnishers of information to CRAs ("furnishers") "echo back" to a CRA that the information that a furnisher has provided to a CRA is disputed in response to a notification from a CRA that the very same information is disputed – undermines the central purposes of the FCRA. *See infra* Part I. The ruling departs from the 2009 federal regulations and guidance issued by the six federal agencies charged by Congress with interpreting the very same section of the statute construed by the court below. *See infra* Part I.A. Further, the Ninth Circuit's opinion will have far-reaching consequences for the national automated credit dispute process but will provide very little benefit to consumers who already have the option to place their own notice of dispute on a consumer report directly with the CRA. *See infra* Part I.B.

The Ninth Circuit acknowledges that it has reached a "different conclusion" from the First Circuit regarding whether the FCRA's preemption clause preempts state-law causes of action for state-law standards saved from preemption by the FCRA preemption clause at issue. *See infra* Part II; Pet. App. 52a. Under the law prevailing in the First Circuit, only federal and state officials may enforce the "saved" state standard. *See infra* Part II. Under the Ninth Circuit's ruling below, any private party may do so. *See id.* Because only two state-law standards are saved by the FCRA preemption clause at issue, there are unlikely to be future occasions for courts outside the First and Ninth Circuits to review

and pass upon this issue. Review by this Court is warranted given the size and importance of the California financial services market and its substantial effect on the national credit dispute process. *See id.*

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE NINTH CIRCUIT'S HOLDING THAT THE FCRA REQUIRES FURNISHERS TO "ECHO BACK" A DISPUTED CHARGE UNDERMINES THE "FAIR AND ACCURATE CREDIT REPORTING" AT THE CENTER OF THE STATUTE.

Congress enacted the FCRA to ensure "fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). The credit reporting regime established by the FCRA ensures fair treatment both to consumers and to those who voluntarily furnish credit information to CRAs ("furnishers"). In 15 U.S.C. § 1681s-2, Congress specified the "responsibilities of furnishers" to CRAs. In that section, Congress set forth detailed duties of furnishers (1) to provide information free from errors; (2) to correct and update consumers' information; (3) to provide notices of dispute; (4) to provide notices of closed accounts; and (5) to provide notices of delinquent accounts. These requirements are not subject to private enforcement; instead, they may only be enforced by federal and state officials. *See id.* § 1681s-2(c), (d).

Private enforcement is permitted regarding the "duties of furnishers" "upon notice of dispute."

Id. § 1681s-2(b). This provision charges furnishers with the responsibility, "[a]fter receiving notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a person to a [CRA]" to "conduct an investigation with respect to the disputed information;" to "review all relevant information provided by the [CRA] . . . .;" to "report the results of the investigation" to the CRA; and "if the investigation finds that the information is incomplete or inaccurate, [to] report those results to all other [CRAs] to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis." *Id.*

It is this last requirement of Section 1681s-2(b) that Respondent seeks to enforce via a private action against Petitioner. *See* Pet. App. 34a. The court below held that this section requires the furnisher to "echo back" to the CRA that the account is disputed in response to the CRA's notification that the account is disputed. *See id.* The Ninth Circuit's ruling not only is in divergence from the relevant federal agencies' recent construction of this very section of FCRA, it is also at odds with the purposes of the FCRA, and introduces great disruption into the standardized credit dispute systems that the industry has adopted to comply with FCRA's credit dispute requirements.

A. The Ninth Circuit's "Echo Back" Ruling Departs From Six Federal Agencies' 2009 Regulations Interpreting FCRA.

The Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal

Reserve System ("Fed"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), the National Credit Union Administration ("NCUA"), and the Federal Trade Commission ("FTC") have been jointly charged by Congress to "establish and maintain guidelines for use by each person that furnishes information to a [CRA] regarding the accuracy and integrity of the information relating to consumers that such entities furnish to [CRAs]," and to "prescribe regulations requiring each person that furnishes information to a [CRA] to establish reasonable policies and procedures for implementing the guidelines" to be issued by the six federal agencies. 15 U.S.C. § 1681s-2(e)(1).

On July 1, 2009, the six federal agencies issued guidelines and regulations as required by Section 1681s-2(e). Final Rule, 74 Fed. Reg. 31484 (July 1, 2009). In doing so, the agencies, among other things, required that "[e]ach furnisher must establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency." *E.g.*, 12 C.F.R. § 41.42(a).

In defining "accuracy" and "integrity" of furnisher information regarding consumers to CRAs, the agencies expressed concern that "it could be difficult or impossible for furnishers to predict what information third parities would find relevant or material . . . ." 74 Fed. Reg. at 31490.

Accordingly, the agencies rejected part of their proposed guidance that would have had the effect of imposing a "material omission" burden on the

furnishers of information. *See id.* In light of the comments to the proposed rule, the agencies decided that it was not appropriate to impose this "unworkable standard" on voluntary furnishers of information. *Id.* Though the agencies, in their final rule, "retain[ed] [a] 'material omission' concept" in the accuracy and integrity guidelines and regulations, they expressly decided to do so "in a manner *that does not place the burden of making that determination on furnishers.*" *Id.* (emphasis added).

Instead, the agencies' regulations "place the burden of making that determination" on the agencies themselves, *id.* *See, e.g.*, 12 C.F.R. § 41.41(e)(3). And, in this regard, the final rule contemplates that the agencies will publish a list of such material omissions. *See, e.g.*, 74 Fed. Reg. at 31490. Currently, the only such listed material omission is a furnisher's failure to include information about a consumer's credit limit. *See id.*

In its expansion of private liability to enforce Section 1681s-2(b), *see* Pet. App. 29a-36a, the Ninth Circuit did not consider, or even cite, the six agencies' new guidance and regulations. But there is reason to believe that the decision below and the six agencies' new guidance and regulations diverge. For example, the Ninth Circuit's "echo back" holding results in private liability for furnishers for their "material omission" of a dispute notation by a consumer. Such a result places the "burden of making" a material omission determination on a furnisher, or on a court after-the-fact. The specter of private liability has the potential to fray or unravel the uniform standards that Congress sought to give

voluntary furnishers of information through the guidance and regulations promulgated pursuant to 15 U.S.C. § 1681s-2(e)(1). Clearly, the court below should have considered this most recent pronouncement of the six federal agencies charged by Congress with implementing the duties of furnishers specified in Section 1681s-2 before rendering a decision vastly expanding the scope of furnisher liability to private parties under FCRA.

Review by this Court is accordingly warranted to ensure harmony between the lower court's construction of the FCRA and the six federal agencies' newly prescribed guidelines and regulations governing the duties of furnishers of information to CRAs.

B. The Ninth Circuit's "Echo Back" Ruling Will Disrupt The National Automated Credit Dispute Process.

The credit dispute process is highly automated and standardized. CRAs and furnishers communicate dispute information to one another through "consumer dispute verification ('CDV') [and automated consumer dispute verification ('ACDVs')] form[s] based on the information the consumer provides." FTC and Board of Governors of the Federal Reserve System, *Report to Congress on the Fair Credit Reporting Act Dispute Process* 14 (Aug. 2006). "CRAs and furnishers also communicate through Universal Data Forms ('UDFs'). *Id.* These forms are standardized and utilize codes to summarize the consumer's dispute. *Id.* at 15.

In addition to the standardized forms, the industry has an electronic dispute processing system

to process these communications between CRAs and furnishers. "The system is web-based and permits furnishers to receive and send ACDVs, and [to] send [Automated Universal Data forms] AUDs, over the Internet." *Id.* "[M]ore than 83% of all disputes" were processed through the electronic system as of 2006. *Id.* The electronic system, like the forms it communicates, is highly dependent upon standardized reason codes and automation. *See id.*

The effect of the Ninth Circuit's ruling is to require that the furnisher "echo back" to the CRA that the account is disputed in response to the CRA's notification that the account is disputed. As the Petitioner points out, the industry's "automated systems, which have been developed over several years to accommodate FCRA's requirements, do not provide a mechanism for reporting an account as 'disputed' under FCRA when a furnisher reports the results of its investigation to the CRA . . . ." Pet. 21. Moreover, given the highly automated nature of the dispute process, it is not feasible, especially from a compliance standpoint, to require additional "free form" entries to this effect and attach them to the automated response. Instead, what is in effect required by the Ninth Circuit's ruling is a complete overhaul of the industry's automated systems. Such an effort would require the expenditure of significant resources to tell a CRA what it already knows: *i.e.*, that the account is in dispute.

By contrast, there is no harm to the consumer from not reporting the disputed account notation to the CRA in response to the CRA's initiation of a dispute process because the consumer is able to attach a notation of dispute to the credit report

directly through the CRA if he or she is not satisfied with the CRA's inquiry and the furnisher's response. *See* 15 U.S.C. § 1681i(b), (c). Accordingly, because of the nationwide impact and importance of the Ninth Circuit's decision on the national automated credit dispute system, this Court's review is warranted.

II. GIVEN THE IMPORTANCE OF THIS CASE TO THE FINANCIAL SERVICES INDUSTRY, THIS COURT SHOULD ADDRESS THE NINTH CIRCUIT'S ACKNOWLEDGED "DIFFERENT CONCLUSION" ON PREEMPTION THAN THAT REACHED BY THE FIRST CIRCUIT.

Section 1681t(b)(1)(F) preempts all state-law "requirement[s] or prohibition[s]" "with respect to any subject matter regulated under" "section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies." 15 U.S.C. § 1681t(b)(1)(F).

Two state laws are specifically saved from preemption by Section 1681t(b)(1)(F) – section 54A(a) of chapter 93 of the Massachusetts Annotated Laws, and section 1785.25(a) of the California Civil Code. These two state provisions consist solely of state-law standards governing the conduct of furnishers of information to CRAs. They do not also include private state-law causes of action to enforce those state-law standards.

As the court below acknowledged, Pet. App. 52a n.32, the Ninth Circuit has reached a "different conclusion" from the First Circuit – as well as every district court to have addressed the issue in

Massachusetts. The courts in the First Circuit have found that private state-law causes of action to enforce the standard set forth in section 54A(a) of Chapter 93 of the Massachusetts Annotated Law are "requirements or prohibitions" "with respect to the subject matter regulated under" "section 1681s-2". *See Gibbs v. SLM Corp.*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005); *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181, 185-86 (D. Mass. 2006); *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 12-13 (D. Mass. 2004). Further, finding that such state-law causes of action do not fall within the narrow scope of the savings clause, which saves only Section 54A(a), the courts in the First Circuit have found such private actions preempted by Section 1681t(b)(1)(F). *See, e.g., Islam*, 432 F. Supp.2d at 185-86; *Gibbs*, 336 F. Supp.2d at 12-13. Accordingly, under the construction of Section 1681t(b)(1)(F) prevailing in the First Circuit, the saved state-law standard may be enforced only by state and federal officials pursuant to 15 U.S.C. § 1681s(c)(1)(B).

By contrast, the Ninth Circuit ruling below held that private state-law causes are saved from preemption by Section 1681t(b)(1)(F). *See* Pet. App. 51a-52a. Specifically, the lower court rejected the "district court's analysis [that the private enforcement actions found outside the saved state statute are preempted] would . . . lead to the conclusion that Congress explicitly retained the portions of the California statutory scheme that create obligations, without leaving in place any enforcement mechanism. That would be an unlikely result at best." *Id.* In a footnote, the Ninth Circuit rejected Petitioner's argument that the FCRA's

enforcement provisions in 15 U.S.C. § 1681s(c) provide specifically for state enforcement of the relevant state-law standard. *See id.* at 57a n.37.

In addition, the Ninth Circuit broke from the law prevailing in the First Circuit by holding that private enforcement was not preempted because private state-law causes of action are not "requirements or prohibitions" within the meaning of Section 1681t(b)(1). *See* Pet. App. 52a. Accordingly, under the Ninth Circuit's ruling, the saved California-law standard of Cal. Civ. Code § 1785.25(a) may be enforced through California civil causes of action by private parties.

As a result, there is a divergence regarding whether Section 1681t(b)(1)(F)'s preemption of state law "requirements or prohibitions" includes state-law causes of action. Furthermore, because only two states' statutes are saved from preemption by Section 1681t(b)(1)(F), there are unlikely to be future occasions for courts outside the First and Ninth Circuits to review and pass upon this issue.

Resolution of this issue is important because, absent review by this Court, the furnishers that do business with California customers – essentially all major financial institutions – will be required to comply with more onerous requirements imposed by the prospect of private liability imposed by California courts and juries. California's banking industry accounts for almost 11 percent of all money deposited in financial institutions throughout the United States. *See* FDIC, *FDIC-Insured Institutions, State Totals as of June 30, 2008*, (showing that nearly 763 billion of 7 trillion dollars nationwide are deposited in financial institutions in California). The

restoration of the uniform federal enforcement regime that Congress created therefore depends on this Court's intervention.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the petition, the petition should be granted.

Respectfully submitted,

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